

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX**

ARC HUMAN SERVICES, INC.¹

Employer

and

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL UNION 23,
AFL-CIO, CLC

Case 6-RC-12031

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Suzanne C. Bennett, a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.²

Upon the entire record³ in this case, the Regional Director finds:

¹ In its brief, the Employer asserts that it was incorrectly stipulated at the hearing that the correct name of the Employer is ARC Human Services, Inc., and further asserts that its correct name is Futtrel, Inc., d/b/a ARC Human Services. The Employer states that it would not object to amending the caption to reflect its correct name. However, the record provides no basis for amending the Employer's name to that now suggested by the Employer, contrary to the all party stipulation at the hearing concerning the Employer's correct name. If appropriate, such an amendment can be dealt with post election, upon motion.

² Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by December 26, 2001.

³ The Employer filed a timely brief in this matter which has been duly considered by the undersigned. The Petitioner did not file a brief.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The petitioner seeks to represent a unit, as amended at the hearing, consisting of all full-time and regular part-time Site Managers, program workers, workshop employees, including one-to-one therapeutic activity aides, floor supervisors and food service workers, and maintenance employees and van drivers employed by the Employer at its group homes and its workshop located in Washington County, Pennsylvania, excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.⁴ While the parties are otherwise in agreement as to the scope and composition of the unit, the Employer contends, contrary to the Petitioner, that the Site Managers⁵ at the group homes must be excluded from the petitioned-for unit because they are supervisors as defined in the Act. There are approximately 95 employees⁶ in the petitioned-for unit, which number includes the Site

⁴ The parties are in agreement that the production managers, the floor care coordinator and the contract coordinator are excluded from the petitioned-for unit as supervisors within the meaning of Section 2(11) of the Act in that they possess the authority to hire, fire, discipline or direct employees or effectively recommend such actions. The parties are in further agreement that the case managers are excluded from the petitioned-for unit in that they are professional employees. In addition, the parties agree that the job coaches, the photo id operator and the janitors are not part of the petitioned-for unit. Finally, neither party contends that the floor supervisors are supervisors within the meaning of the Act.

⁵ The Site Managers are also referred to as Residential Site Managers, and were formerly called Community Home Coordinators.

⁶ This number is based on the petition.

Managers whose supervisory status is in dispute. There is no history of collective bargaining for any of the employees involved herein.

The Employer is a Pennsylvania not-for-profit corporation with its principal offices located in Meadowlands, Pennsylvania, and provides residential care and vocational services for individuals with mental retardation.⁷ The Employer's Executive Director is Michael Reardon. Reporting to Reardon is Deputy Director Kerry Riddell, and reporting to Riddell is Residential Program Director Kim Durham. Reporting to Durham are four Program Specialists, and reporting to the Program Specialists are the Site Managers who are at issue herein. Included within the Employer's supervisory hierarchy are the directors of the other departments: Human Resources, Finances, the Vocational Programs and the Janitorial Program.

As part of the services the Employer offers to retarded individuals, the Employer operates 20 group homes situated in Washington County. One to six retarded individuals, ranging in age from 14 to 72, reside at each home. During the day, these individuals participate in the Employer's workshop program, attend day programs, or participate in job coaching experiences.

All of the homes, except four, are staffed around the clock. Working at the homes are Site Managers and program workers.⁸ The Employer employs about 16 Site Managers. While most of the Site Managers are each responsible for the operation of one group home, one Site Manager is responsible for two homes, and one Site Manager is responsible for four homes. The number of program workers assigned to each home varies, to a maximum of six, depending on the number and needs of the individuals living there.⁹

⁷ At the hearing, the parties stipulated, and I find, that the Employer is a health care institution within the meaning of Section 2(14) of the Act.

⁸ The program workers are also referred to as residential program workers.

⁹ The Residential Program Director is available by cell phone at all times. She is on call 24 hours a day, every day. The Program Specialists are available by cell phone or pager.

The program workers assist the individuals living in the home with their personal care needs, such as bathing and taking their medications, and assist them with the household responsibilities, such as cleaning, cooking and doing laundry. The program workers are assigned to work a day, evening or night shift, although there is a great variance in the actual hours of the shifts. The program workers are paid from \$6.43 to \$7.28 per hour.

The Site Managers are responsible for the operation of the homes. They work three day shifts and two evening shifts per week. The Site Managers are required to work at least two direct care shifts per week.¹⁰ Depending on the staffing of a particular group home, the Site Managers may be working alone or with one or more program workers. The Site Managers are paid \$9.74 to \$13.06 per hour.¹¹ All full-time employees, including the program workers and the Site Managers, receive the same benefits: health care, vacation leave, paid holidays, sick leave, short term disability insurance, long term disability insurance and life insurance.

In addition to their other duties described herein, the Site Managers have certain responsibilities with respect to the individuals residing in the homes. Thus, the Site Managers are responsible for handling the financial transactions for the individuals living at the home, such as balancing their checkbooks, preparing their monthly SSI reports, and payment of their taxes. The Site Managers also have primary responsibility for grocery shopping, although the program workers also do the grocery shopping if necessary. Further, the Site Managers are responsible for completing certain documentation beyond that completed by the program workers. Thus, the Site Managers participate, along with Program Specialists, in the preparation of an annual Individual Program Plan for each resident. In addition, the Site Managers complete a portion of

¹⁰ The record does not reflect that the Site Managers are provided with cell phones or pagers. Although the Residential Program Director testified that the Site Managers are on call 24 hours a day, 7 days a week, a Site Manager testified that she is not on call at all times.

¹¹ The Program Specialists, who are admitted supervisors, are paid a salary of \$22,000 to \$26,000 per year.

a quarterly report. Finally, the Site Managers monitor the administration of medications by the program workers, as explained more fully below.

The Site Managers complete performance appraisals for program workers at the conclusion of a three-month probationary period¹² and on an annual basis thereafter. In this appraisal, the Site Manager evaluates the program worker on 11 different factors and assigns an alphabetical ranking to each factor. The Site Manager may also make brief comments on each factor. The Site Manager then presents the appraisal to the program worker. The Site Manager may request that a Program Specialist be present at this meeting. Thereafter, the appraisal is forwarded to the Program Specialist for signature, to the Residential Program Director for her signature and then to the Human Resources Director. The record does not reflect any changes made to an evaluation by a Program Specialist or the Residential Program Director after the evaluation was completed by a Site Manager.

The rankings on the evaluations directly affect a program worker's job status or rate of pay. Thus, on a probationary evaluation, if a program worker is ranked as deficient in more than two factors, the program worker is not deemed to have successfully completed a probationary period. Further, the Employer grants a standard four percent raise based on successful performance as measured on the performance appraisal. On an annual evaluation, if a program worker is ranked as deficient in more than two factors, the program worker is not granted any raise. Further, the program worker is then re-evaluated in three months.

The record reveals that about 11 months ago, a program worker received an unsatisfactory evaluation at the end of the probationary period. As a result, the probationary

¹² The Employer utilizes an old version of a job description for the Site Managers. While this job description otherwise describes the duties of the position, it recites that evaluations are completed at the conclusion of a six-month probationary period. This statement is contradicted by the uniform testimony of the witnesses and by the dates on the evaluations introduced into evidence. Similarly, the job description does not accurately relate the procedure followed by the Site Managers in completing the evaluations. The testimony uniformly reflects that the Site Manager independently completes the evaluation, presents it to the program worker and then forwards it to upper management.

period was extended following a discussion between the Site Manager involved, the Residential Program Director and the Human Resources Department. Further, the record reveals that within the last 90 days, a program worker did not receive a raise based on a Site Manager's evaluation.

The Employer maintains a progressive discipline policy consisting of an oral warning, a written warning, both of which are documented and retained in an employee's personnel file, and then suspension or discharge.¹³ The Site Managers have the authority to, and do, issue oral warnings and written warnings. The record does not reflect that upper management conducts any independent investigation of the underlying incidents, either before or after the warning is issued. These warnings are retained in the employee's personnel file and become the basis for progression to the next step of the disciplinary system.

As part of the progressive discipline system, the Site Managers have the authority to recommend suspension and to recommend termination. There is no contention, and no evidence, that the Site Managers have the independent authority to suspend or discharge¹⁴ a program worker. The record contains an example of a Site Manager recommending the suspension of a program worker, who, contrary to the Site Manager's directives, drove an Employer vehicle. The Site Manager reported the incident to the Program Specialist, who in turn, reported it to the Residential Program Director. As a result, a three-day suspension was imposed. The record also contains an example of a Site Manager sending a program worker home for arguing with the Site Manager, and subsequently notifying upper management.

As part of the Site Managers' responsibilities, the Site Managers monitor the administration of medications by program workers. The program workers, and the Site

¹³ The record testimony indicates that the progressive disciplinary policy is strictly followed. This, however, does not compel the conclusion, suggested by the Petitioner at the hearing, that the Site Managers' participation in the process is merely ministerial or routine.

¹⁴ To the contrary, all terminations must be approved by the Executive Director.

Managers as well,¹⁵ administer medications to the individuals residing in the homes. In order to administer medications, employees must be certified on an annual basis.

Medication errors are the subject of a specific Employer discipline policy. This policy has a specific multi-step corrective action procedure¹⁶ for documentation errors and other errors not involving the actual administration of medications, but utilizes the established progressive discipline system for errors in the administration of medications. The Employer utilizes a form for tracking medication errors, which is completed by the Program Specialists and maintained in the Residential Program offices. If there is a medication error, the Site Manager contacts the Program Specialist to find out if the program worker has had other prior incidents, and the Program Specialist enters the current incident on the tracking form.

The record reveals an example of a program worker being issued progressive discipline for medication errors. The program worker testified that the Site Manager had issued an oral warning, and then a written warning for medication errors. On the third incident, the program worker was suspended.

The Employer has a written grievance procedure, in which the Site Managers participate. The Site Managers are the first step in the grievance procedure, with unresolved complaints then proceeding to the Residential Program Director, and from her to a Personnel Committee comprised of two program workers, a Site Manager, a Program Specialist, as well as other admitted management personnel, and ultimately from the Committee to the Executive Director. According to the Residential Program Director, under this procedure, the Site

¹⁵ The Program Specialists and the Residential Program Director are also certified to pass medications.

¹⁶ Under this procedure, for the first and second occurrences, the employee is counseled; for the third occurrence, the employee is issued an oral warning; for the fourth occurrence, the employee is issued a written warning and retrained; for the fifth occurrence, the employee is issued a second written warning and retrained; for the sixth occurrence, the employee is suspended for three days and retrained; further occurrences may result in termination.

Managers can resolve grievances, including those involving warnings. The record does not reflect, however, any examples of the Site Managers actually exercising such authority.

The Site Managers are responsible for scheduling program workers. The staffing levels are pre-determined, as are the shifts that program workers may be assigned to work. Within these constraints, the Site Managers prepare schedules on a weekly basis and process requests for changes in the schedule. If a program worker requests time off, the Site Manager signs the request to verify that there is coverage, and then forwards the request to the Program Specialist for approval. The Site Manager also signs the program workers' timecards in order to verify tardiness, leaving early, vacation leave, holiday leave and sick leave.

In addition to scheduling program workers, the Site Managers also participate in obtaining coverage when program workers call off work. At times, program workers obtain their own coverage when they call off. At other times, if the program worker calling off has not obtained coverage, the program worker who takes the call will try to obtain coverage. If the program worker cannot obtain coverage, the program worker will contact the Site Manager.¹⁷ At other times, the Site Manager will take the call off and try to obtain coverage.

In covering for program workers, the Site Managers use a list of all program workers maintained by the Employer, and make calls from this list, but not in any particular order. If the Site Manager cannot obtain coverage, the Site Manager is responsible for filling in for the absent program worker. If absolutely necessary to insure adequate staffing, the Site Manager can authorize overtime.

The Site Managers are responsible for training newly-hired program workers, providing 24 hours of training over a three to four day period. The Site Managers also provide 24 hours of in-service training per year. They also conduct unannounced site visits, either by themselves or

¹⁷ If the Site Manager is not available, the program worker contacts a designated Program Specialist, who obtains coverage.

accompanied by the Program Specialist; these unannounced visits usually occur on the night shift.

The Site Managers attend monthly staff meetings conducted by the Residential Program Director, attend meetings conducted by Program Specialists, and conduct monthly meetings for the program workers at the home.

Based on the above and the record as a whole, noting particularly the role of the Site Managers in the completion of evaluations and the issuance of discipline, I shall exclude the Site Managers from the petitioned-for unit because they possess indicia of supervisory status under the Act.¹⁸

Specifically, the Site Managers complete evaluations that directly affect the employment status of program workers. Thus, the record establishes that the probationary and annual evaluations of each program worker are completed by the Site Manager at the respective home. The Site Manager, without consultation with higher management, rates each program worker on 11 factors, assigning an alphabetical ranking and providing brief written comments on each factor. If the program worker is ranked as deficient in more than two factors on a probationary evaluation, the program worker is not deemed to have successfully completed a probationary period. If the program worker is ranked as deficient in more than two factors on an annual evaluation, the program worker is not granted a raise.

The evaluations completed by the Site Managers herein directly affect the employment status and raises of the program workers. The Site Managers do not need the approval of

¹⁸ In this case, there is no contention, and no supporting evidence, that the Site Managers possess the authority to hire, transfer, lay off, recall, or promote employees, or to effectively recommend such actions. While the Employer offered limited evidence of the authority possessed by the Site Managers to adjust grievances, the record reflects no evidence of the actual exercise of such authority. In these circumstances, and in light of my findings that the Site Managers are supervisors by virtue of their completion of evaluations and issuance of discipline, I need not, and do not, determine whether the authority possessed by the Site Managers to adjust grievances is sufficient to support a finding of supervisory status. Finally, to the extent that the Employer is contending that the Site Managers assign or responsibly direct employees, I find that the Employer has not carried its burden of establishing that the Site Managers possess these indicia of supervisory status.

higher management before issuing the evaluations or showing them to the program workers. The evaluations are signed by upper management, but there is no evidence that anyone in upper management independently investigates the basis for the evaluations or changes the rankings assigned. Thus, the rankings given by the Site Managers in their evaluations of the program workers directly determine whether the program workers successfully complete their probationary period or are granted a wage increase. Under these circumstances, where there is a direct correlation between the evaluations independently prepared by the Site Managers and the increases given or not given to the program workers evaluated by the Site Managers, I find that this function of the Site Managers is an indicia of supervisory status within the meaning of Section 2(11) of the Act. Extendicare Health Facilities, Inc. d/b/a Trevilla of Golden Valley, 330 NLRB No. 193 (2000); First Healthcare Corporation d/b/a Hillhaven Kona Healthcare Center, 323 NLRB 1171 (1997); Bayou Manor Health Center, Inc., 311 NLRB 955 (1993). Cf. Training School at Vineland, 332 NLRB No. 152 (2000).

In addition, under the Employer's disciplinary system in effect in this case, the Site Managers do more than merely report factual incidents in order that upper management can decide whether to issue discipline. Here the Site Managers issue documented oral and written warnings which affect job status and tenure. There is no independent investigation by higher management before the Site Manager issues the warnings and the warnings are retained in an employee's personnel file and form the basis for progression to the next step of the disciplinary system. Under these circumstances, where the Site Managers independently issue warnings which form the basis for suspension and discharge, I find that the Site Managers' issuance of discipline is an indicia of supervisory status under the Act. Venture Industries, Inc., 327 NLRB 918, 919-920 (1999); The Presbyterian Medical Center, 218 NLRB 1266, 1268 (1975).

The record herein demonstrates that the Site Managers issue evaluations that directly affect the employment status of or raises granted to the program workers, and issue documented oral and written warnings that affect the program workers' job status and tenure.

Accordingly, I find that the Site Managers are supervisors within the meaning of the Act, and therefore I shall exclude them from the unit found appropriate herein.

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time program workers, workshop employees, including one-to-one therapeutic activity aides, floor supervisors and food service workers, and maintenance employees and van drivers employed by the Employer at its group homes and its workshop located in Washington County, Pennsylvania; excluding office clerical employees, Site Managers and guards, professional employees and other supervisors as defined in the Act, and all other employees.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit set forth above at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.¹⁹ Eligible to vote are those employees in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the

¹⁹ Pursuant to Section 103.20 of the Board's Rules and Regulations, official Notices of Election shall be posted by the Employer in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. As soon as the election arrangements are finalized, the Employer will be informed when the Notices must be posted in order to comply with the posting requirement. Failure to post the Election Notices as required shall be grounds for setting aside the election whenever proper and timely objections are filed. The Board has interpreted Section 103.20(c) as requiring an employer to notify the Regional Office at least five (5) full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice.

commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.²⁰ Those eligible shall vote whether or not they desire to be represented for collective bargaining by United Food and Commercial Workers International Union, Local Union 23, AFL-CIO, CLC.

Dated at Pittsburgh, Pennsylvania, this 12th day of December 2001.

Gerald Kobell
Regional Director, Region Six

NATIONAL LABOR RELATIONS BOARD
Room 1501, 1000 Liberty Avenue
Pittsburgh, PA 15222

177-8520-0800
177-8540-8090

²⁰ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc. 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that the election eligibility list, containing the full names and addresses of all eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, Room 1501, 1000 Liberty Avenue, Pittsburgh, PA 15222, on or before December 19, 2001. No extension of time to file this list may be granted, except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.